IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 6, 2008 at Jackson

STATE OF TENNESSEE v. JOVAN XAVIER MOORE

Appeal from the Circuit Court for Bedford County
Nos. 16059, 16060, 16061, 16062, 16063 Robert Crigler, Judge

No. M2007-02515-CCA-R3-CD - Filed September 16, 2008

Aggrieved of his five Bedford County Circuit Court jury convictions of selling .5 grams or more of cocaine and his effective Department of Correction sentence of 24 years, the defendant, Jovan Xavier Moore, appeals. He challenges the sufficiency of the convicting evidence, the trial court's order consolidating the five separate indictments for trial, and the trial court's sentencing determinations. Because we hold that one conviction is infirm due to the trial court's denial of a severance of the trial regarding that single offense, we reverse one conviction and remand it for a new trial but affirm the others. We also affirm the trial court's sentencing determinations.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed in Part; Reversed in Part; Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES, J. and DAVID G. HAYES, SR. J., joined.

Donna Orr Hargrove, District Public Defender; and Andrew Jackson Dearing, Assistant Public Defender, for the appellant, Jovan Xavier Moore.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The five drug convictions emanated from five "controlled buys" that occurred, respectively, on April 4, 11, 13, 18, and 20, 2006. The State's proof showed that, in April 2006, agents of the 17th Judicial District Drug Task Force set up a controlled drug buying operation that utilized the services of a confidential informant, Tandy Holt. At trial, the agents detailed their procedures in handling Ms. Holt on each of the five dates, including the recording of Ms. Holt's telephone calls to a specified number to set up the transactions, the video and/or audio recording of the transactions, physical surveillance prior to or during the transactions, and the officers'

precautions on each occasion in assuring that Ms. Holt handled the purchase money and the contraband properly. Ms. Holt, after admitting that she previously had been convicted of five counts of passing worthless checks, had used cocaine, and had facilitated drug deals from her home during the winter of 2005-06, testified at length about the five transactions involving the defendant. Each transaction was arranged by Ms. Holt's placing a telephone call. According to Ms. Holt's testimony, on each offense date she call a specified cellular telephone number that she had for the defendant. Below, we summarize the State's evidence as it relates to each transaction.

April 4, 2006

After confronting Ms. Holt with their knowledge of her drug involvement and procuring her assistance as a confidential informant, task force agents arranged for her to set up drug "buys." She called prospective sellers, including a man who identified himself as "Lyric," the defendant's nickname. One agent testified that he prepared a hidden camera with recording and "real time" monitoring capabilities in Ms. Holt's living room. Within an hour of the telephone call, a man whom the agent identified from the video as the defendant entered the house and handed Ms. Holt something. Then, after filling a plastic jug with water for his overheated car radiator, the defendant handed Ms. Holt something and left. The agent collected rock-like material from Ms. Holt that proved to be cocaine weighing .7 grams.

Ms. Holt testified that she called the cellular telephone number for the defendant on April 4. She identified both the audio recording of the telephone conversation and the video recording of the transaction in her home, identified the defendant's voice and/or images on the recordings, and testified that he delivered crack cocaine to her in exchange for $100 in currency that she gave him.

April 11, 2006

On this date, Ms. Holt called the same cellular telephone number for the defendant and arranged to meet him at his trailer at Lot 6 in Sherwood Trailer Park in Shelbyville. A task force agent described the procedures he used in "wiring" Ms. Holt, noting that although he followed her to the trailer park, he did not see Ms. Holt meet with the defendant. The agent collected the contraband from Ms. Holt after her visit to the trailer park. The contraband proved to be 1.3 grams of cocaine.

Ms. Holt testified that she recognized the voices of herself and the defendant on the recordings of the pre-transaction telephone call and of the transaction itself, in which she again paid the defendant $100 for crack cocaine.

April 13, 2006

With the task force agents' help, Ms. Holt again called the same telephone number, and at trial, she identified the voices of herself and the defendant on the recordings of the telephone

call and of the ensuing transaction, in which she again purchased crack cocaine from the defendant in exchange for $100 in currency. One of the task force agents testified that he kept Ms. Holt's movements under surveillance as she was directed by the seller to a parking area near a Masonic Lodge. He testified that Ms. Holt consummated the transaction in a car that the agent recognized as belonging to the defendant. The transaction yielded .5 grams of cocaine.

April 18, 2006

Ms. Holt documented the fourth transaction by identifying in her testimony the voices of herself and of the defendant on the recordings of the April 18 telephone call and of the ensuing transaction, which according to the testimony of one of the officers, occurred along a public street where the agent saw the defendant get into Ms. Holt's vehicle. Ms. Holt testified that she again exchanged $100 for crack cocaine from the defendant. After transporting the defendant back to a housing project where the defendant's girlfriend lived, Ms. Holt turned over to the task force cocaine that weighed .6 grams.

April 20, 2006

According to the task force agent who observed Ms. Holt's actions on April 20, she called the defendant and was directed to a housing project. The agent followed Ms. Holt to the project and saw her enter the defendant's car, which sat in the parking lot. Ms. Holt testified that the defendant gave her crack cocaine in exchange for $100. She again identified the voices on the telephone-call and transaction recordings as being those of herself and the defendant. The State proved that this last transaction yielded .9 grams of cocaine.

Testifying in his own behalf, the defendant said that he had known Ms. Holt prior to April 2006 because he had bought $30 worth of cocaine from her. He continued to visit in her home because he had developed what he characterized as a benevolent interest in Ms. Holt's 16-year-old daughter. He testified that Ms. Holt was usually "high" when he was present. He testified that he never sold drugs to Ms. Holt. He admitted that he went into her residence on April 4, 2006, but did so only because his car's engine was overheating; he went in to fill a milk jug with water. He denied delivering drugs to her and denied receiving money from her on that occasion.

The defendant further denied that his voice was depicted on any of the telephone-call or transaction tapes. He denied participating in any of the transactions. He also denied that he ever had a cellular telephone with the number that, according to Ms. Holt, she had used to reach him. He denied that the officers had retrieved such a telephone from his hand following a foot chase on May 17, 2006. Furthermore, the defendant denied that he had ever lived in the Sherwood Trailer Park. The defendant did admit that his street name was "Lyric."

On rebuttal, one of the task force agents testified that, on May 17, 2006, he pursued a vehicle in which the defendant was a passenger. When the vehicle stopped, the driver and the defendant fled on foot. The officer testified that when he caught the defendant, the defendant carried

a cellular telephone that was assigned the same number that Ms. Holt had used to reach the defendant. On surrebuttal, the defendant claimed that this officer was "incorrect" about this telephone.

The jury convicted the defendant of five counts of selling .5 grams or more of cocaine, and the trial court sentenced the defendant to an incarcerative term of 12 years on each count. The court aligned two of the sentences to run consecutively, yielding an effective sentence of 24 years in the Department of Correction.

I. Sufficiency of the Evidence

In his first issue on appeal, the defendant challenges the legal sufficiency of the convicting evidence. The gravamen of his challenge is that the State established neither that he was the individual who sold the cocaine nor that the defendant was in possession of the cocaine. He claims that the evidence against him was circumstantial and was legally vulnerable to the test for evaluating circumstantial evidence. Respectfully, we disagree on all accounts.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

A criminal offense may be established exclusively by circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237 (Tenn. 1973); *Winters*, 137 S.W.3d at 654; however, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford*, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). "In other words, '[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.'" *State v. McAfee*, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987) (quoting *Crawford*, 470 S.W.2d at 613).

"It is an offense for a defendant to knowingly . . . sell a controlled substance . . . ." T.C.A. § 39-17-417(a)(3) (2006). Cocaine is a Schedule II controlled substance. *Id*. § 39-17-408(b).

First, we address the defendant's claim that only circumstantial evidence supports a finding that he was the perpetrator of the offenses. To the contrary, Ms. Holt offered eyewitness testimony that, on each of the five dates alleged, the defendant sold her a substance which, according to other, undisputed evidence, proved to be cocaine. Eyewitness testimony is "direct," as opposed to "circumstantial," evidence. *See State v. Coulter*, 67 S.W.3d 3, 69 (Tenn. Crim. App. 2001); *Echols v. State*, 517 S.W.2d 18, 23 (Tenn. Crim. App. 1974) ("Moreover this was not a circumstantial evidence case. There was positive eye witness testimony concerning the robbery."); *State v. John Mark Burns*, No. W2003-01464-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Jackson, Sept. 21, 2004) (characterizing eyewitness testimony as direct evidence) (citing Neil P. Cohen, et al., *Tennessee Law of Evidence* § 4.01 [5] (4th ed. 2000)); *State v. Artez Moreis*, No. W2002-00474-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App. Apr. 2, 2003) (noting that the "convictions do not rest solely upon circumstantial evidence but are supported by . . . eyewitness testimony"). Direct evidence need not be so "strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *See Coulter*, 67 S.W.3d at 68 (quoting *Pearson v. State*, 226 S.W. 538, 541 (Tenn. 1920), and recognizing that "[w]hen the State's proof is both direct and circumstantial, 'it is not necessary for a conviction that a defendant's innocence must be excluded from every reasonable hypothesis deducible from the circumstances.'"). Furthermore, in keeping with time-honored constraints upon appellate review of a jury's findings of fact, we defer to the jury's determination of the credibility of Ms. Holt and the other witnesses, including the defendant. Obviously, the jury accredited the testimony presented by the State, which was clearly sufficient to establish that the defendant was the perpetrator of the offenses.

Next, we address the claim that the State failed to establish the defendant's "possession" of the contraband. We fail to comprehend this claim because (1) Tennessee Code Annotated section 39-17-417(a)(3) proscribes the sale of a controlled substance, *compare* T.C.A. § 39-17-417(a)(3) *with id.* § 39-17-417(a)(4) (proscribing possession with intent to sell), and (2) the indictments in the present case alleged a sale, not possession with intent to sell. Thus, possession was not an element of the charged or conviction offenses. The evidence presented by the State otherwise overwhelmingly established the elements of those offenses.

II. Severance of Offenses

The defendant claims that the trial court erred in consolidating – or in not then severing – the five charges that resulted in the convictions. Ultimately, we determine that one conviction is infirm due to the failure to sever that charge. Our review of the issue begins with an explanation of the burden of proof and the standard of appellate review. We will then explain the issue of mandatory severance as it relates to the State's motion to consolidate the separate indictments. We will then apply the principles to the case at hand to conclude that the trial court erred in two respects in denying the defendant's bid for severance. We will then address the issue of harmless error in two segments by (1) first assessing whether the record of the pretrial severance

hearing evinces a basis for denying severance apart from that erroneously relied upon by the trial court and, if it does not, (2) then assessing the impact of the errors *vis a vis* the evidence presented at trial. As we shall explain, the underlying errors were only partially harmless.

A. Standard of review; burden of proof

When a defendant seeks a severance, the burden is on the State to show that the offenses should not be severed. *State v. Denton*, 149 S.W.3d 1, 13 (Tenn. 2004). The issue of the propriety of a trial court's consolidation of indictments or severance of charges is reviewed on appeal for abuse of discretion. *Spicer v. State*, 12 S.W.3d 438, 442 (Tenn. 2000); *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The trial court's resolution of the issue will be reversed only when that court (1) applied an incorrect legal standard or (2) reached an illogical decision that resulted in injustice to the complaining party. *Spicer*, 12 S.W.3d at 442.

Because the determination whether multiple charges based on alleged multiple offenses should be joined or separated for trial establishes a format for trial, the issue obviously must be presented and resolved before trial. *Bruce v. State*, 213 Tenn. 666, 670, 378 S.W.2d 758, 760 (1964); *see* Tenn. R. Crim. P. 13(b) (providing that trial court may order severance of offenses before trial); Tenn. R. Crim. P. 14(a)(1)(A) (providing that defendant, except in the event of a later arising ground, shall move to sever offenses "before trial"). When such an issue is presented, the trial court must resolve it before trial from the "evidence and arguments presented at [a consolidation/severance] hearing." *Spicer*, 12 S.W.3d at 445.

B. The relationship between permissive consolidation and mandatory severance

To consolidate separate indictments pursuant to Tennessee Rule of Criminal Procedure 8(b), the State need show nothing more than that the offenses are "of the same or similar character." Tenn. R. Crim. P. 8(b)(2); *Spicer*, 12 S.W.3d at 443. However, the legal standard applied to the issue of mandatory severance of charges, as opposed to consolidation, is different: A defendant has an "absolute right" pursuant to Tennessee Rule of Criminal Procedure 14(b)(1) "to a severance of offenses permissively joined, unless the offenses are parts of a common scheme or plan and the evidence of one offense 'would be admissible upon the trial of the others.'" *Spicer*, 12 S.W.3d at 443; *see* Tenn. R. Crim. P. 14(b)(1). In *Spicer*, our supreme court also held that, "when a defendant objects to a pre-trial consolidation motion by the state, the trial court must consider the motion by the severance provisions of [Tennessee] Rule [of Criminal Procedure] 14(b)(1), not the 'same or similar character' standard of Rule 8(b)." *Spicer*, 12 S.W.3d at 443. In other words, a defendant's objection to the State's motion to consolidate charges from separate indictments transforms the trial court's inquiry into one of whether the defendant is entitled to a severance. *See* Tenn. R. Crim. P. 14(b)(1). *Spicer* teaches that a rule that requires a defendant to formally move for a severance immediately after the objection to consolidation is overruled makes little practical sense[,] emphasize[s] technicality of procedure over substantive fairness, . . . add[s] unjustifiable expense and delay to the proceedings, and . . . defeat[s] the very purposes to be served by the Rules of Criminal Procedure. *Spicer*, 12 S.W.3d at 444.

C. Applied principles

In the present case, the defendant objected to the State's motion to consolidate. Thus, despite the absence of a defense motion to sever, we review the issue for abuse of the trial court's discretion in determining whether the various offenses shared a common scheme or plan and whether evidence of one would be admissible in the trial of the others. With respect to this latter prong, the standard promulgated by our supreme court is a combination of the provisions of Tennessee Rule of Criminal Procedure 14(b)(1) and Tennessee Rule of Evidence 404(b), which limits the use of evidence of the defendant's other crimes to situations wherein the evidence is relevant to "other purposes" than to show that the defendant had a propensity to commit the offense on trial. We reiterate that the Rule 14(b)(1) standard is more demanding than the one applied via Rule 8 to permissive joinder of offenses, which may only involve a determination that the offenses "are of the same or similar character." *See* Tenn. R. Crim. P. 8(b)(2). We note that the offenses in the present case were surely of the same or similar character, but that characterization does not resolve the issue whether the trial court should have afforded the defendant a right to have the charges severed.

In the present case, the trial court did not mention Rule 14 and seemed to limit its adjudication to the principles contained in Rule 8. The court acknowledged that the offenses were of the same or similar character, and it was influenced to consolidate the offenses by the need for judicial economy. *See* Tenn. R. Crim. P. 8(b) (explaining the bases for permissive joinder of offenses). Thus, from our reading of the trial court's findings, we conclude that the court merely determined that the indictments may be joined for trial.

As we detailed above, an abuse-of-discretion on this issue occurs when the trial court applies an incorrect legal standard. *See Spicer*, 12 S.W.3d at 442. Given the trial court's expressed rationale for consolidating the offenses, we hold that the trial court applied an incorrect legal standard. *State v. Dotson*, 254 S.W.3d 378, 388 (Tenn. 2008) (stating that, in a similar treatment of a consolidation/severance issue, the "issue should have been addressed under the right to severance under Rule 14(b)(1)," and not merely under Rule 8).

Furthermore, in the pretrial hearing in the present case, no evidence was presented; the prosecutor merely described the nature of the cases it would present. The prosecutor revealed that the State's proof would show that the drug task force utilized the same confidential informant on five occasions to call the defendant to arrange purchases of cocaine from him and to ultimately consummate the transactions. The prosecutor stated that the defendant's venal activity evinced a common scheme or plan. In *Spicer*, however, the supreme court mentioned that the consolidation/severance issue should be resolved from "the evidence *and* arguments" presented in the pretrial hearing. *Spicer*, 12 S.W.3d at 445 (emphasis added). The court further stated, "In all cases in which the state seeks to consolidate multiple offenses by pre-trial motion over the objection of the defendant, *the state must bring forth sufficient evidence at the hearing* to establish that specific acts constitute parts of a common scheme or plan." *Id.* at 447 (emphasis added). Indeed, *Spicer* held that the trial court's denial of severance despite the State's failure to present "evidence" in the

pretrial hearing was an abuse of discretion. *Id.* at 447. Similarly, in the present case, the denial of a severance in the absence of evidence countervailing that right was error.

D. Harmless error

The errors, however, are subject to harmless error analysis. Tenn. R. Crim. P. 52(a); *Dotson*, 254 S.W.3d at 388; *Spicer*, 12 S.W.3d at 447. As mentioned above, we divide the harmless error analysis into two segments.

1. Pretrial level

We noted above that the severance issue should be presented and resolved prior to trial. Therefore, we recognize that the examination of the harmless error issue must first be directed to that pretrial proceeding.

> [B]ecause the trial court's decision of whether to consolidate offenses is determined from the evidence presented at the [pretrial] hearing, appellate courts should usually only look to that evidence, along with the trial court's findings of fact and conclusions of law, to determine whether the trial court abused its discretion by improperly joining the offenses.

Spicer, 12 S.W.3d at 438. When the pretrial proceeding reflects that the State established a proper basis for denying severance, the appellate court, by looking only to that evidence as directed by the supreme court, may be able to determine that the denial of severance, despite the trial court's use of an incorrect legal standard, was nevertheless justified. Thus, the appellate court's first task in determining harmlessness of the error should be to analyze the record at the pretrial level.

We briefly illustrate the rules that direct a Rule 14(b)(1) analysis. As mentioned above, a defendant has a right to severance of offenses "unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others." *See* Tenn. R. Crim. P. 14(b)(1). Thus, the finding of a common scheme or plan is the State's first hurdle in defeating a motion to sever.

"To be part of a common scheme or plan, offenses 'must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s).'" *State v. Martin Jeffery Edwards*, No. W2004-00091-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Jackson, Jan. 31, 2005) (quoting *State v. Peacock*, 638 S.W.2d 837, 840 (Tenn. Crim. App. 1982).[1]

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[1] In *Martin Jeffery Edwards*, this court encountered a multiplicity of drug-sale offenses that "occurred within fifteen days of one another," with "[t]he same police operative [going] to the same location and exchang[ing] the same (continued...)

The other hurdle for the State is to show that the "evidence of one [offense] would be admissible in the trial of the others." To fathom that issue, Tennessee Rule of Evidence 404 comes into play. *See State v. Tracy Farrell*, No. E2001-01199-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, May 21, 2002). The thrust of Rule 404 is that although, generally, "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity with the character or trait on a particular occasion," *see* Tenn. R. Evid. 404(a), evidence of "other crimes, wrongs, or acts" may be admissible for "other purposes" such as proving identity, criminal intent, or rebuttal of accident or mistake. Tenn. R. Evid. 404(b); Tenn. R. Evid. 404, Advisory Comm'n Comments; *State v. Hallock*, 875 S.W.2d 285, 292 (Tenn. Crim. App. 1993). To determine whether evidence of other crimes, wrongs or acts is admissible pursuant to Rule 404(b) for a purpose other than to prove that the person acted in conformity with a character trait, the trial court must determine whether "a material issue exists other than conduct conforming with a character trait," and the court "must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice." Tenn. R. Evid. 404(b); *see Spicer*, 12 S.W.3d at 445 (stating that, before charges may be consolidated over the defendant's objection, "the trial court must conclude from the evidence and arguments presented at the hearing that: (1) the multiple offenses constitute parts of a common scheme or plan; (2) evidence of each offense is relevant to some material issue in the trial of all the other offenses; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant") (citations omitted).

We took the time to explain these processes to illustrate that the issues presented by a defendant's objection to consolidation are rather complex and can involve intricate factual determinations that typically cannot be made without an evidentiary basis. Therefore, the State's failure in the case at hand to present evidence at the pretrial hearing deprived the trial court of any basis for denying severance based upon Rule 14(b)(1) principles and precludes the appellate court from discerning a Rule 14(b)(1) basis for such a denial. Accordingly, we cannot say that the proceedings at the pretrial level in the present case rendered the errors at that level harmless.

2. Trial level

We progress then to an analysis of whether the errors are harmless in light of the evidence presented at trial. At this level, "[i]n most severance cases, 'the line between harmless and prejudicial error is in direct proportion to the degree . . . by which proof exceeds the standard required to convict.'" *Spicer*, 12 S.W.3d at 447-48 (quoting *Delk v. State*, 590 S.W.2d 435, 442 (Tenn. 1979)). Our supreme court has said more lately, however, that "[t]he key question [in addressing the harmlessness of a consolidation error] is whether the error likely had an injurious effect on the jury's decision-making process." *Dotson*, 254 S.W.3d at 389.

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[1](...continued)
amount of cash for a similar amount of the cocaine with the same defendant." *Martin Jeffery Edwards*, slip op. at 4. We held that the "similarities between the . . . offenses establish[ed] a common scheme or plan." *Id.*

In the present case, the evidence showed that on April 4 and 18, 2006, a task force agent witnessed Ms. Holt's meetings with the defendant and that on April 13 and 25, 2006, an agent saw Ms. Holt enter an automobile that the agent recognized as belonging to the defendant. Thus, with respect to these four offenses, Ms. Holt's testimony that she bought drugs from the defendant was essentially corroborated by eyewitness testimony, and we see no real probability that the outcome would have been different had theses offenses been tried separately. The evidence presented on these four charges essentially shared the same evidentiary quality, and we see no basis for saying that one as opposed to any of the others evinced a weakness that suggests that the jury convicted on the basis of the defendant's propensity to sell drugs.

The April 11, 2006 offense, however, is of a different stripe. The agent followed Ms. Holt to Sherwood Trailer Park but did not see where she went inside the park and did not see her in the presence of the defendant. Although the State placed into evidence the audio recordings of Ms. Holt's April 11 telephone call to the defendant and her transactional meeting with him, the State relied upon Ms. Holt's testimony to identify the defendant's voice on the tapes. The defendant testified that he not only sold no drugs to Ms. Holt but also that he never resided in Sherwood Trailer Park. Although the evidence of the defendant's guilt of this offense was sufficient, we cannot say that it was overwhelming or even that it rose to the same level as that presented for the other offenses. *See id.* The weaker nature of the proof of this offense leads us to conclude that the jury's verdict was most likely unfairly influenced by proof of the other offenses.

We conclude that the trial court committed reversible error in consolidating the charge for the April 11 offense, case number 16060, with the other four; however, the joining of those four was harmless error. The conviction imposed in case number 16060 is reversed, and that charge is remanded for a new trial.

III. Sentencing

In his final issue, the defendant claims that the trial court erred in denying alternative sentencing and that the sentence was unconstitutionally enhanced without the participation of a jury.

A. Alternative sentencing

"The burden of demonstrating that a sentence is erroneous is upon the party appealing." *State v. Carter*, 254 S.W.3d 335, 344 (Tenn. 2008). The appellate court shall conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *Id.* This presumption is conditioned upon the "affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* at 344-45 (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)).

The sentencing court may "select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of the [the Sentencing Act].'" *Id.* at 343 (quoting T.C.A. § 40-35-210(d) (2006)). The appellate court is not free to

disagree with the "trial court's weighing of the various enhancement and mitigating factors." *See id.* at 345. "A trial court's weighing of various mitigating and enhancement factors has been left to the trial court's sound discretion." *Id.* In determining the specific sentence as well as the "appropriate combination of sentencing alternatives," however, the court shall consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
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> (2) the presentence report;
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> (3) the principles of sentencing and arguments as to sentencing alternatives;
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> (4) the nature and characteristics of the criminal conduct involved;
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> (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
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> (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
>
> (7) any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b) (2006). "A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and the record of prior felony convictions filed by the district attorney general with the court, as required by § 40-35-202(a)." *Id.* § 40-35-210(f).

In determining the manner of service of a sentence, the trial court should consider the defendant a favorable candidate for alternative sentencing options when: (1) the defendant has not been convicted of the "most serious offenses," possesses no criminal history evincing a "clear disregard for the laws and morals of society," and evinces no failure of past rehabilitative efforts," *id.* § 40-35-102(5); (2) the defendant is an especially mitigated or standard offender; (3) the defendant is convicted of a Class C, D, or E felony; and (4) no evidence exists to contradict such favorable candidacy. *Carter*, 254 S.W.3d at 347; *see* T.C.A. § 40-35-102(6). "[F]avorable status consideration," however, does not equate to a presumption of such status. *Carter*, 254 S.W.3d at 347.

The defendant was sentenced as a Range I offender. Each conviction offense was a Class B felony, for which the sentencing range is eight to 12 years. *See* T.C.A. § 40-35-112(a)(2).

In the sentencing hearing in the present case, the State relied upon the proof presented at trial and upon the presentence report. That report showed that the 20-year-old defendant had garnered prior misdemeanor convictions of possession of marijuana (twice), possession of a weapon with intent to go armed (twice), evading arrest, failure to appear, and violation of the driver's license law. The defendant presented no evidence. The trial court applied no mitigating factors. The court enhanced each sentence based upon its findings that the defendant possessed a record of criminal convictions or behavior in addition to that required to establish the sentencing range, *see id.* § 40-35-114(1), that, based upon four prior probation revocations, the defendant previously failed to comply with the conditions of a sentence involving release into the community, *see id.* § 40-35-114(8); and that, at the time the present offenses were committed, the defendant was on probation, *see id.* § 40-35-114(13)(C).

The court imposed a 12-year sentence on each conviction. It ordered the sentences in indictments numbered 16059, 16060, and 16061 to run concurrently with each other and the sentences in 16062 and 16063 to run concurrently with each other. The first effective sentence was imposed to run consecutively to the latter, for an aggregate effective sentence of 24 years.

The record evinces ample bases for denying alternative sentencing in the defendant's case. The defendant, at a young age, had amassed a number of prior misdemeanor convictions, including two for drug possession and two for carrying a weapon. *See id.* § 40-35-103(1)(A) (declaring the propriety of confinement to protect society from defendants who have long histories of criminal conduct). Also, the defendant's earlier placements on probation had been revoked on multiple occasions. *See id.* § 40-35-103(1)(C) (declaring the propriety of confinement when "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant"). Thus, based upon the record before us, we affirm the denial of alternative sentencing.

B. Sentencing enhancement by trial judge

The defendant claims that his Sixth Amendment right to jury trial was violated by the trial judge's finding and application of enhancement factors to lengthen his sentences. Again, we disagree.

We acknowledge that Tennessee's pre-2005 sentencing law was constitutionally infirm in the wake of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), which held that Washington's scheme for a judge's enhancement of a sentence ran afoul of the Sixth Amendment to the United States Constitution. *See id.* at 301, 124 S. Ct. at 2536 ("'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'") (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)); *see also State v. Gomez*, 239 S.W.3d

733 (Tenn. 2007) (applying the principles of *Blakely* to determine that Tennessee's pre-2005 sentencing code violated Gomez' right to jury trial). The defendant committed his offenses, however, in April 2006, after the 2005 "*Blakely*" amendments to the sentencing code became effective on June 7, 2005. *See* 2005 Tenn. Pub. Acts, ch. 353. The 2005 version of the sentencing law, pursuant to which the defendant was sentenced, complies with Sixth Amendment principles. *See Cunningham v. California*, 594 U.S. 270, ___ n. 18, 127 S. Ct. 856, 871 n. 18 (2007) (citing the 2005 version of Tennessee Code Annotated section 40-35-210(c) as a statute that "permit[s] judges genuinely 'to exercise broad discretion . . . within a statutory range,' which 'everyone agrees' encounters no Sixth Amendment shoal'"); *Carter*, 254 S.W.3d at 343 (Tenn. 2008) (stating that the 2005 amendments were enacted "[i]n order to avoid the constitutional violation arising from a trial court['s] increasing a presumptive sentence on the basis of judicially-determined enhancement factors").

Accordingly, we reject the defendant's claim that his sentences ran afoul of his Sixth Amendment rights.

IV. Conclusion

We affirm the defendant's convictions and sentences in four of his cases – the indictments numbered 16059, 16061, 16062, and 16063. We reverse the conviction in the indictment numbered 16060, and the charge in that case is remanded for a new trial. Because the sentence in 16060 was imposed to run concurrently with 16059 and 16061, the reversal occasions no change in the defendant's effective sentence.

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JAMES CURWOOD WITT, JR., JUDGE